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SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

—0—

No. 78-1155

—0—

JOSEPH VITEK, Individually and as Director of the Department of Correctional Services; ROBERT PARRATT, Individually and as Warden of the Nebraska Penal Complex; JACK CLEAVENGER, Individually and as Director of the Department of Public Institutions; KLAUS HARTMANN, M.D., Individually and as Superintendent of the Lincoln Regional Center; BENJAMIN COATES, Individually and as Head of the Security Building, Lincoln Regional Center,

Appellants,

vs.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

—0—

MOTION OF APPELLEE TO PROCEED IN FORMA PAUPERIS

—0—

COMES NOW Larry D. Jones, Appellee herein, and moves this Court for leave to proceed in this action in forma pauperis pursuant to Rule 53, as he is unable to pay fees, costs, or costs of printing. Appellee is presently incarcerated in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

Appellee's affidavit in support of this motion is attached hereto.

Thomas A. Wurtz
Counsel for Larry D. Jones, Appellee
University of Nebraska College of Law
Lincoln, Nebraska 68583

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Appellee to Proceed In Forma Pauperis was served upon the appellant by mailing a true copy thereof to Mr. Melvin Kammerlohr, Assistant Attorney General, 2115 State Capitol,

Lincoln, Nebraska 68509, first-class postage prepaid, on this 20 day of March, 1979.

Attorney for Appellee

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Appellants,

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Appellees.

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AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

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I, Larry D. Jones, appellee herein, being first duly sworn, depose and say in support of my motion for leave to proceed in forma pauperis:

1. I am the appellee in the above-entitled action.

2. I am presently incarcerated in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

3. That I am unable because of my poverty to pay any fees, costs, or printing costs.

4. That I am entitled to the redress I seek in the above-entitled action.

5. The nature of said cause is briefly stated as follows:

> The State of Nebraska has appealed a judgment of a three-judge court, enjoining the State of Nebraska from transferring me to a mental institution without due process of law.

Larry D. Jones

Larry D. Jones, Appellee

STATE OF NEBRASKA)
) SS.
COUNTY OF LANCASTER)

DULY SUBSCRIBED AND SWORN to before me this 20 day of March, 1979.

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Affidavit was served upon the appellant by mailing a true copy thereof to Mr. Melvin Kammerlohr, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, first-class postage prepaid, on this 20 day of March, 1979.

Attorney for Appellee

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On Appeal from a Three-Judge Court of the United States District Court for the District of Nebraska

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MOTION OF APPELLEE TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION

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Thomas A. Wurtz
University of Nebraska
College of Law
Lincoln, Nebraska 68583
Tel: (402) 472-1263
Attorney for Appellees

2

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Schuster v. Herold, 410 F.2d 1071 (1969) . . . . . .

Vitek v. Miller, 436 U.S. 407 (1978) . . . . . .

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Neb. Rev. Stat. § 83-180(1) (Reissue 1976) . . . . . .

CONSTITUTION CITED

Constitution of the United States, Fourteenth Amendment .

In The

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MOTION TO AFFIRM

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The Appellee moves the Court to affirm the judgment of the court below, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the constitutionality of Neb. Rev. Stat. § 83-180(1) (Reissue 1976) as applied to the plaintiff-intervenor Larry D. Jones.

The statute provides for the involuntary transfers of persons sentenced to the Department of Correctional Services to a term of years, to the Lincoln Regional Center, a mental hospital, not within the Department of Correctional Services, but within Department of Public Institutions. The statute provides for such involuntary transfers without any formal notice or hearing or any other safeguard, other than determinations by one or more psychiatrists that the persons suffer from a mental disease or defect, and could not be given proper treatment within the Department of Correctional Services.

The appellants had previously appealed from the decision of a three-judge court of the United States District Court for the District of Nebraska entered on October 14, 1977, declaring Neb. Rev. Stat. § 83-180(1) to be unconstitutional in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. On May 23, 1978, this Court vacated the judgment entered October 14, 1977, and remanded the case for consideration of the question of mootness (Vitek v. Miller, 436 U.S. 407, 98 S.Ct. 2276, 56 L. Ed.2d 381).

On October 27, 1978, the district court entered a Memorandum of Decision that the case was not moot and reinstated the same judgment as was previously vacated. Appellants again filed notice of appeal on November 21, 1978. On January 8, 1979, Larry Jones, Appellee, had his limited parole revoked by the Board of Parole of the State of Nebraska, and presently remains confined in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska.

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II.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

The Fourteenth Amendment to the Constitution of the United States forbids any state to "deprive any person of . . . liberty . . . without due process of law."

The court below, in recognizing that due process is a flexible concept, chose to use the analytical framework set out by this Court in the case of Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976) which suggested:

> ". . . [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail. See, e.g., Goldberg v. Kelly, supra, at 263-271."

The court below closely evaluated plaintiff's private interest of his avoidance of being stigmatized and labeled mentally ill, and his avoidance of a more controlled confinement, which would include behavior modification through the use of drugs. The court felt the risk of an erroneous deprivation of these private interests to be high. After balancing these and the state's interest the court merely made a factual determination that the involuntary transfer in question was tantamount to a major change in the plaintiff's condition of confinement which amounted to a grievous loss. Clearly, the plaintiff has a protected liberty interest in the avoidance of being stigmatized men ally ill, and subjected to chemotherapy and behavior modification programs. Due process, therefore, attached to the plaintiff's liberty interest.

Minimal due process requirements were then ordered by the court below based upon the case of Morrissey v. Brewer, 408 U.S. 471 (1972), which involved an analagous parole revocation. Availability of counsel was also deemed necessary by the court because of the disabilities which accompany the mentally ill.

The opinion of the court below merely followed the direction of this Court as set down by its earlier decisions.

Counsel for the appellant has argued that the court below was bound by the holdings of Meachum v. Fano, 427 U.S. 215 (1976) and Montayne v. Haymes, 427 U.S. 236 (1976). These

cases are clearly inapplicable to the case at hand as they dealt with involuntary transfers from one prison to another, and did not treat the issue of the constitutionality of an involuntary transfer from a state prison to a state mental hospital. An involuntary transfer of a prisoner from a correctional complex to a state mental hospital is clearly distinguishable from an involuntary transfer from one prison to another. Even if the cases are remotely applicable, the case at hand clearly comes within the exception noted in Meachum, supra.

The thrust of the opinion below is also consistent with the opinions set forth in:

Baxstrom v. Herold, 383 U.S. 107 (1966).

U. S. ex rel. Schuster v. Herold, 410 F.2d 1071 (2nd Cir. 1969).

Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1977).

even though the similar issues were resolved through an equal protection analysis.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as to not need further argument, and Appellee respectfully moves the Court to affirm the judgment entered in the cause

by the United States District Court for the District of Nebraska.

Respectfully submitted,

THOMAS A. WURTZ

University of Nebraska
College of Law
Lincoln, Nebraska
Tel: (402) 472-1263

Attorney for Appellees

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee was served upon the appellant by mailing a true copy thereof to Mr. Melvin Kammerlohr, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, first-class postage prepaid, on this 20 day of March, 1979.

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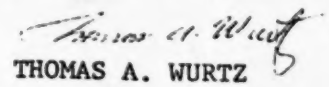

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Attorney for Appellees

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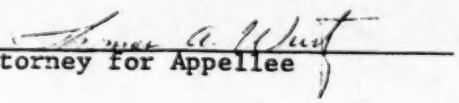

Attorney for Appellee